



Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony in Opposition of HB607 Public Safety Factor in Setting Bail Sponsors Representatives LaRe and Swearingen

Chair LaRe, Vice Chair Swearingen, Ranking Member Leland and members of the House Criminal Justice Committee. I am State Public Defender Tim Young. Thank you for the opportunity to testify on behalf of the Office of the Ohio Public Defender (OPD) in opposition to House Bill 607 (HB607).

Ohio's monetary bail system disproportionately disadvantages low-income individuals. The inability to pay a bail of \$100 may be hard to imagine for some, but it is the reality for many Ohioans. Financial hardships can force individuals to stay in jail and miss work while their case is pending. If they miss work – they get fired and getting fired is simply not an option for most people. These individuals sometimes feel compelled to plead guilty to crimes they may not have committed in order to get out of jail. While release from incarceration resolves that individual's immediate problem, a criminal conviction can cause severe impediments to obtaining employment, housing, financial aid, professional licenses, and social services later. This same conundrum is not felt by wealthier Ohioans who have the means to simply post bail and return to work while their case is pending. Despite the fact that the wealthy Ohioan and the poor Ohioan might have the exact same charge, criminal record, and presumption of innocence, an individual's ability to post bail can impact the outcome of their case and the rest of their life.

It is worth repeating that these people are presumed innocent, meaning they are legally innocent. In 1987, Chief Justice Rehnquist in *U.S. v Salerno* wrote, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."¹ Yet, at present the pretrial imprisonment rate in the United States is among the highest in the world – more than four times the

¹ *United States v. Salerno*, 481 U.S. 739 (1987).

world's median pretrial imprisonment rate.² Cash bail infringes on the liberty of legally innocent Ohioans and punishes them because they have limited means. Being indigent does not mean someone is a bad or dangerous person. Just as being wealthy does not mean someone is a good person.

As this committee knows, the Ohio Supreme Court found that monetary bail is about one thing – ensuring defendants appear for their hearings.³ Despite being constitutionally permissible, monetary bail does not further the goal because there is “no causal nexus between money bail and guaranteed appearance.”⁴ That is why jurisdictions that have implemented bail reform have experienced improvements in their failure to appear rates. Historically, the failure to appear rate is 40%.⁵ When New Jersey implemented bail reform in 2016, they saw a 20% reduction in their jail population as 95% “of defendants were released pretrial and 89 percent of them appeared at their trial date.”⁶ If HB607 wanted to decrease failures to appear, the bill should require that individuals receive telephone, text, and electronic message reminders of hearings. This is a better approach to ensuring appearance for court hearings than simply adding language specifying the court must consider all relevant factors. Text message reminders have been shown in multiple jurisdictions to significantly reduce failures to appear, in some instances by as much as 13%.⁷

This committee obviously knows HB607 is not enough to overturn *DuBose* without the HJR2. However, the analysis and holdings in *DuBose* have been Ohio Supreme Court precedent even before

² <https://harvardlawreview.org/2018/02/bail-reform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/> (citing Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, Jail Inmates at Midyear 2014).

³ *DuBose v. McGuffey*, Slip Opinion No. 2022-Ohio-8.

⁴ Jennifer Williams, *Stop Assuming Money Bail is an Effective Tool for Criminal Justice*, The American Bar Association, https://www.americanbar.org/groups/judicial/publications/appellate_issues/2020/winter/stop-assuming-money-bail-is-an-effective-tool-for-criminal-justice/.

⁵ Alissa Fishbane, Aurelie Ouss, Anuj K. Shah, *Behavioral nudges reduce failure to appear for court*, American Association for the Advancement of Science, Nov. 6, 2020.

⁶ Lea Hunter, *What You Need To Know About Ending Cash Bail: What's Wrong with Cash Bail and How to Fix It*, Center for American Progress, March 16, 2020, <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/16/481543/ending-cash-bail/#:~:text=The%20cash%20amount%20serves%20as,in%20court%20for%20their%20trial.>

⁷ Josan Tashea, *Text-message reminders are a cheap and effective way to reduce pretrial detention*, American Bar Association Journal, July 17, 2018,

[https://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail.](https://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail)



DuBose.⁸ In 2020, in a concurring opinion joined by Justice Donnelly and Chief Justice O’Connor, Justice Stewart reiterated that, “setting a high bail in order to keep someone accused of a crime incarcerated before trial is both statutorily and constitutionally unlawful.”⁹ Despite the holdings of the U.S. Supreme Court and Ohio Supreme Court, setting bail at a level defendant cannot pay is seen as a mechanism for public safety. This is a fallacy. Cash bail does not make communities safer.¹⁰ Money is not safety. In fact, cash bail allows the potential for dangerous people to be released just because they have money.

The history of cash bail is a history of two Americas – divided by money. Instead of taking the time to set conditions of release that will ensure public safety and appearance at court, Ohio has been placing monetary bail on defendants hoping it will resolve both issues. Incarcerating people, who are presumed innocent and pose no threat to the public, actually creates a public safety risk. A study by the ACLU found that pretrial detention increases the likelihood the individual will be convicted, sentenced to jail or prison, and receive a longer sentence compared to those charged with the same crime who were not incarcerated pretrial.¹¹ Pretrial detention leads to prison, and prison creates more skilled criminals and more dangerous individuals. Cash bail makes communities less safe.

A new data-rich study finds that detaining a person in jail for even one day before they’ve been found guilty, or innocent of a crime can have lasting effects on that person’s life and does not guarantee the safeguards most people assume detention provides.¹² The study builds upon previous studies indicating that pretrial detention for longer than three days is associated with higher rates of failing to appear and re-arrest during the pretrial phase. New data using time-stamped information for more

⁸ *State ex rel. Sylvester v. Neal*, 140 Ohio St.3d 47, 2014-Ohio-2926, 14 N.E.3d 1024, ¶ 16; *State ex rel. Baker v. Troutman*, 50 Ohio St.3d 270, 272, 553 N.E.2d 1053 (1990).

⁹ *Mohamed v. Eckelberry*, 162 Ohio St.3d 583, 2020-Ohio-4585.

¹⁰ Yvette C. Hammett, *Study: Jailing people on bail does not make communities safer*, The Legal Examiner, Dec. 10, 2020, <https://www.legalexaminer.com/legal/study-jailing-people-on-bail-does-not-make-communities-safer/>.

¹¹ Ohio Could Save Big by Implementing Bail Reform: A Fiscal Impact Analysis, Addendum: Cash Bail’s Influence on Sentencing Disparities and Case Outcomes, March 2021, https://www.acluohio.org/sites/default/files/fiscalimpactreport-addendum_2021-0312.pdf.

¹² Lowenkamp, Christopher, Hidden Costs Revisited (March 21, 2022).

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4063164



precise estimates, and more rigorous statistical analyses, confirms that pretrial detention is not consistently associated with the likelihood of failing to appear, is associated with a higher likelihood of a new arrest pending trial, and is associated with an increased likelihood of receiving a sentence to jail or prison and a longer sentence compared to those that were released pretrial. Thus, it is possible that pretrial detention makes things worse for justice-involved individuals. And, if pretrial detention actually inflicts harm, then not only does it compromise public safety, but it also forces the public to bear additional costs—not only financial costs but the human costs on those who are incarcerated unnecessarily and their families.

In *DuBose*, the Ohio Supreme Court said that when considering safety, courts are to look to conditions like home detention, ankle bracelets, daily reporting requirements, and other oversight and monitoring that will ensure the public is safe if the person is released. Furthermore, The American Bar Association, the Pretrial Justice Institute, and Ohio Criminal Sentencing Commission among other organizations all agree that pretrial services like these are less expensive than keeping individuals incarcerated. While the *DuBose* court left open the option of monetary bail for assuring the defendant's appearance in court, cash bail neither protects public safety nor assures a defendant's appearance. This committee should be considering House Bill 315 instead, which is a fantastic first step towards moving to a fair and balanced judicial system where an individual's economic status does not dictate their treatment and potentially the outcome of their case. Thank you for the opportunity to speak today before your committee. I am happy to answer questions at this time.

